Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

MICHAEL JOHNSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition involves a murder prosecution in Indiana in which Petitioner Michael Johnson's primary defense counsel was a third-year public defender with no murder trial experience. Unprepared, the defender sought but was denied a continuance shortly before trial. At trial, only one witness identified Johnson as the shooter, and Johnson desired to testify that another suspect (a habitual offender) committed the crimes. Johnson's counsel, however, failed to prepare Johnson to exercise his constitutional right to testify, and hence did not call him to testify. Johnson was convicted and is serving a 60-year sentence.

Denial of post-conviction relief (ruling Johnson received effective assistance of counsel, and had not shown the outcome "would" have changed had he testified) was affirmed by the Indiana Court of Appeals. The Indiana Supreme Court, by a divided 3-2 vote, declined to review the matter. The Indiana courts decided an important question of federal constitutional law in a way that conflicts with relevant decisions of this Court, and also decided an important question of federal constitutional law that should be settled by this Court.

The two questions presented are:

(1) Whether, when a criminal defendant desires to testify, the Sixth Amendment's guarantee of effective assistance of counsel requires defense counsel to prepare the client to exercise the right to testify.

(2) Whether, in requiring Johnson to show the outcome "would" have changed had he testified, the state court decided an important question of federal law in a way that conflicts with the "reasonable probability" test established by this Court.

RULE 14.1(b) STATEMENT

The following are parties to the proceeding in the State of Indiana:

1. Michael Johnson
2. State of Indiana
3. *Amicus curiae* Indiana Civil Liberties Union
4. *Amicus curiae* Dean Emeritus Norman Lefstein

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual, and Respondent is the State of Indiana.

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OPINIONS BELOW

The 3-2 decision of the Indiana Supreme Court denying review is included in the Appendix ("App.") at 47a. The decision of the Indiana Court of Appeals affirming denial of post-conviction relief is included in the Appendix at 1a. The trial court decision denying post-conviction relief is included in the Appendix at 12a.

JURISDICTION

The 3-2 decision of the Indiana Supreme Court denying review of the Indiana Court of Appeals decision was entered on October 28, 2004. This petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a public and speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense.*

U.S. Const. Amend. VI (emphasis added).

STATEMENT OF THE CASE

I. Background And Prior Treatment Of Constitutional Issues Presented

A. The Underlying Criminal Prosecution

A shooting occurred in Indianapolis in 1997, a period of time in which the city was experiencing a high number of murders. It is undisputed that one of two persons committed this particular shooting — either Demonn Carter ("Demonn" so as to avoid confusion among suspect Demonn Carter and victim Ron Carter) or Johnson — and that the other is innocent. This is a classic "whodunit" case that raises important questions of constitutional jurisprudence.

Johnson was prosecuted in Marion County, Indiana, for the murder of Gary Davenport ("Davenport") and the attempted murder of Ron Carter ("Ron"). The case stemmed from a drug transaction to which, it is undisputed, Johnson was not a party, and in which he did not know victims Davenport or Ron. Another individual, habitual offender Demonn, was present, was a party to the drug transaction, and knew the victims. Within days of the shooting, Demonn — an aspiring confidential informant — went to the police and blamed Johnson for the crime. Johnson was charged with murder, attempted murder, and possession of a handgun. No motive was ever established as to why Johnson would commit these crimes. Demonn was not prosecuted for these crimes.

Johnson, an indigent, was to be defended by the Marion County Public Defender's Office. Unfortunately, however, his case saw appearances from five different deputies, but

was ultimately assigned to and handled by a third-year lawyer (Ray Casanova ("Casanova")) who had never tried a murder case. This public defender sought and obtained several continuances in the case. Ten days prior to his first murder trial, the public defender moved for another continuance, accurately representing to the trial court that he was not prepared to defend his client. [App. 45a-46a]. Five business days prior to trial, the motion was denied (much to the public defender's surprise); Johnson was tried the next week; and he was convicted by a jury of murder, attempted murder, and possession of a handgun. [App. 45a]. Age 22 at the time of sentencing in October, 1998, Johnson was sentenced to 60 years for murder, 40 years for attempted murder, and 1 year for possession of a handgun, all to be served concurrently.[1]

Johnson appealed, challenging the trial court's admission of evidence that he had a prior criminal conviction. Because the public defender had waived this error by not preserving it with an objection at trial, the conviction was affirmed on review. [App. 36a].[2]

B. The Post-Conviction Proceedings

Johnson, with the undersigned as new counsel serving *pro bono*, filed a petition for post-conviction relief challenging his murder and attempted murder convictions on the basis of ineffective assistance of counsel under the

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1. Johnson did not challenge the handgun possession charge, and it is not at issue in this Petition.

2. Indiana precedent precluded Johnson from raising ineffective assistance of counsel on direct appeal if he were to raise it later, with additional evidence, on post-conviction relief.

United States Constitution. At the PCR hearing, ineffective assistance of counsel was asserted on four different fronts based on undisputed facts, including that an inexperienced public defender trying his first murder case decided not to call Johnson to testify on his own behalf *solely* because he had failed to prepare Johnson to testify.

The trial court denied Johnson's PCR petition. [App. 12a]. With respect to the public defender's failure to prepare Johnson to exercise his constitutional right to testify, the trial court held that Johnson "was not prejudiced" by this. [App. 29a]. The trial court further held, applying the wrong constitutional standard, that Johnson's testimony "would not have affected the jury's verdict given the strength of the eyewitness testimony." [App. 29a].

C. The Appellate Proceedings

Johnson timely initiated his appeal to the Indiana Court of Appeals, and requested oral argument. The Court of Appeals, however, never ruled on that request, so no oral argument was held. Johnson's appeal was supported by an *amicus curiae* brief of the Indiana Civil Liberties Union. The Court of Appeals, however, denied leave to the ICLU to participate.

By a nine-page memorandum decision, the Court of Appeals affirmed the trial court. With respect to the public defender's failure to prepare Johnson to exercise his constitutional right to testify, the court held that there was no prejudice from this. [App. 9a-11a]. The court did not reach the issue of whether the trial court applied the wrong legal standard when it held that Johnson's testimony would not

have changed the outcome. [App. 11a]. Johnson timely petitioned for rehearing, demonstrating that the appellate decision was erroneous. Johnson again asked for oral argument. The petition for rehearing and the request for oral argument were denied in one-line orders without explanation.

Johnson, again with the support of the Indiana Civil Liberties Union as *amicus curiae*, and also with the additional *amicus curiae* support of Norman Lefstein, Professor of Law and Dean Emeritus of the Indiana University School of Law – Indianapolis, sought transfer (discretionary review) to the Indiana Supreme Court to correct the illegal infringement of his constitutional rights.

D. By A Divided 3-2 Decision, The Indiana Supreme Court Denied Review

On transfer to the Indiana Supreme Court, oral argument was held, and two Justices voted to grant transfer and review the matter. [App. 47a-48a]. A third vote for transfer was not obtained, however, so transfer was denied, the state court post-conviction proceedings terminated, and Johnson remains unlawfully incarcerated. The Indiana Supreme Court's one-paragraph order stated in relevant part, without citation of authority, that the post-conviction trial court ". . . did in fact apply the proper legal standard in deciding the case." [App. 47a].[3]

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3. With the assistance of the undersigned, Johnson has since initiated a separate habeas corpus proceeding under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Indiana, No. 1:04-CV-1810 (LJM-WTL). The State has asked for dismissal of the petition asserting untimeliness.

II. Additional Undisputed Facts

A. The Shooting

Demonn — a habitual violent offender now serving 80 years for an unrelated subsequent murder — came to Johnson's house on the morning of March 17, 1997, and asked him for a gun and to join him. After initial resistance, Johnson agreed. Demonn then drove them to the house of Davenport, a drug dealer whom Demonn knew. Johnson had never previously met Davenport. Ron — a convicted felon who had previously spent time in jail with Demonn — was also at the Davenport house. Johnson also did not know Ron, but Demonn did. Indeed, Demonn and Ron previously had served time in prison together.

An argument broke out — it is undisputed that the argument did *not* involve Johnson — and soon thereafter someone shot Davenport and Ron. The shooter was either Demonn or Johnson — no one else was present other than the two victims. Davenport died, while Ron went to Wishard Hospital and survived.

B. Initial Descriptions Suggested That Demonn Was The Shooter

Ron's initial description of the suspect included the last name "Carter," and a physical description of height 5'9", about "200 pounds" and indicated the suspect had "two gold front teeth." It is undisputed that Demonn has gold teeth — Johnson does not. The "gold teeth" description was broadcast on local news. When first interviewed by police at Wishard,

Ron gave no indication by any description or otherwise that Johnson was the shooter.[4]

C. Demonn Reports Johnson To The Police

While Johnson returned to his home, Demonn — who had been working to become a confidential informant with local police — remained busy. First, the day after the shooting, Demonn went to the detective with whom he was collaborating on drug set-ups, and Demonn accused Johnson of the shootings. Police failed to take available steps to investigate Demonn's culpability (such as doing gunshot residue testing on him).

Demonn then went to Wishard Hospital where the only surviving victim, Ron, was being treated. Demonn entered Ron's hospital room; a verbal altercation broke out; Ron yelled to his family to "get him [indicating Demonn] out that's one of the dudes that shot me"; and security was called. Ron's hospital room was changed for security reasons, and Ron remained concerned for his safety throughout the remainder of his Wishard stay. From that point on, Ron would consistently blame Johnson for the shootings and ultimately be the sole State's witness at trial pinning the shootings on Johnson.

Johnson paid no such visit to victim Ron. Instead, when police passed by Johnson's house the next day and indicated that they might be arresting him soon, he stated that he would be there. And indeed he was. When police arrested him, Johnson cooperated; gave a voluntary statement; admitted

4. Johnson is approximately 5'7" and 160 pounds, not 5'9" and 200 pounds.

being present at the scene of the crime; and admitted the elements of the handgun charge for which he was convicted and sentenced to one year, but Johnson denied the shootings.

D. A Young, Inexperienced Public Defender Gets His First Murder Trial

In March of 1997, the State charged Johnson with the murder of Davenport and the attempted murder of Carter. A handgun possession charge was also included. Johnson was indigent, so the public defender's office was appointed to represent him. Johnson, of course, had the Sixth Amendment right to effective assistance of counsel in these very serious charges. Through the course of the next 17 months, however, five different public defenders would enter appearances for Johnson. Most provided no representation whatsoever. In December of 1997, third-year lawyer Casanova entered his appearance, and the case would be his and his alone to prepare for the trial that began on August 17, 1998. Casanova, though a devoted public servant, was now lead counsel in his first murder trial, yet he received no meaningful supervision and guidance from experienced supervising attorneys in preparing for trial.[5]

The public defender did perform some investigation, conducted some discovery, and filed some pre-trial motions prior to trial. Many tasks were never performed, however. For example, the public defender:

- failed to interview victim Ron's three family members who were at Wishard when Demonn had an altercation with Ron;

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5. The undersigned has great respect for those who serve the indigent as public defenders. Unfortunately, however, a combination of inexperience, lack of supervision, heavy case load, and unpreparedness led to ineffective assistance of counsel by the public defender's office.

- failed to interview Wishard hospital staff and security regarding Demonn's altercation with Ron;
- failed to procure and use Ron's medical records from Wishard, which are replete with evidence of Demonn's altercation with Ron and Ron's fear for his personal safety;
- failed to use the services of any experts;
- failed to depose Demonn, despite being told to do so in a written memo by a more senior public defender; and
- failed to bring Demonn before the jury so the jury could see Demonn's two front gold teeth (that matched the initial description given immediately after the shooting).

Despite the pendency of the case for 17 months, with only 10 days left before trial, on August 7, 1998, the public defender filed yet another motion for continuance because the public defender — by his own representation to the trial court — was not prepared for trial. [App. 45a-46a]. On the afternoon of August 10, 1998, the Court denied the continuance, so the unprepared public defender had four business days to prepare for his first murder trial. [App. 45a]. Disastrous results followed.

At trial, the public defender's actions and omissions included the following:

- he failed to seek exclusion of highly prejudicial evidence that Johnson was on parole at the time of the shooting;

- despite the public defender's desire to have Johnson testify at trial and Johnson's desire to testify, he failed to prepare him to testify; and

- because he had not adequately prepared Johnson to testify, he decided not to call Johnson to testify at trial.

Surviving victim Ron (with whom Demonn had an altercation at Wishard) testified at trial, declared that Johnson rather than Demonn was the shooter, and guilty verdicts were rendered on all counts against Johnson. His direct appeal to the Indiana Supreme Court on the murder and attempted murder charges, challenging the admission of the prejudicial evidence that he was on parole, was unsuccessful because the public defender had failed to object to such evidence, thus waiving the error. *Johnson v. State*, 725 N.E.2d 864, 867 (Ind. 2000).

E. Unrefuted Evidence Of Objectively Deficient Representation Of Johnson

At the post-conviction trial, Johnson presented substantial and unrefuted evidence that the representation received in the murder trial was objectively deficient.

1. *Unchallenged Evidence From The Inexperienced Public Defender*

Casanova, the public defender who tried his first murder case representing Johnson while in his third year of practice, testified at the post-conviction trial. His testimony was essentially unchallenged by the State.

Casanova would have benefited from more supervision and mentoring in the defense of Johnson's case. He had a heavy case load during the time he represented Johnson. Ten days before trial on August 7, 1998 — some 17 months after the case was filed against Johnson — Casanova filed a motion for continuance on a Friday due to his unpreparedness for trial. [App. 45a-46a]. The motion stated, "Due to defense counsel's trial calendar the last two months, he has not had an adequate opportunity to prepare for trial." [*Id.*]. That was a truthful statement to the trial court, and at the PCR hearing Casanova confirmed that there was "no question about that – that ten days before trial, [he was] not adequately prepared for the defense of the Michael Johnson murder case." That motion was filed on a Friday, and Casanova anticipated the motion would be granted.

On Monday afternoon, August 10, 1998, Casanova learned otherwise. Five business days prior to his first murder trial, a trial he was admittedly unprepared for, Casanova learned that the court had denied the continuance. That left only four work days before trial and much work left to be done. It was too late to do further investigation, witness interviews, or depositions. Notably, Casanova's client, Johnson, did not know that his lawyer was unprepared and that he had sought but not received a continuance.

When Casanova was assigned the case, he was instructed by a senior public defender to depose Demonn, the other possible shooter. Demonn was never deposed, however. Demonn, who had gold teeth consistent with the first suspect identification broadcast, was not brought before the jury at trial to show them his gold teeth.

Casanova admitted that "objectively speaking . . . attorneys defending Michael Johnson needed to show that Ron Carter was not credible in order to show reasonable doubt of Michael Johnson's guilt or innocence." He agreed that a public defender needed "to show a reason why Ron Carter would lie about Michael Johnson's role in the shooting."

Regarding evidence of Johnson's prior criminal conviction, Casanova admitted that defense counsel should attempt to keep 404(b) evidence of prior crimes from being heard by the jury. That is done, of course, by motions in limine or objections. He admitted it is objectively reasonable and prudent to try to keep out 404(b) evidence. However, he inexplicably allowed the admission of evidence before the jury that Johnson had a prior criminal conviction.

Regarding Johnson's constitutional right to testify in his own defense, Casanova believed that Johnson might make a good witness to testify in his own defense, but Casanova did not prepare Johnson to testify. Casanova testified:

Q. You thought he made a good impression?
A. Yes I did . . .

Q. And you desired to have him testify?
A. I did — yes.

Q. Because of the time constraints and your other obligations, it's accurate that you did not adequately prepare Mr. Johnson to testify in front of the jury — is that correct?
A. That's correct.

Q. And that impacted your decision to not have him testify in the case — is that correct?
A. Yes. That's correct.

Casanova further admitted in his post-conviction testimony that "we didn't have enough time to really sit down and prepare." Based upon the lack of preparation, Casanova "came to the conclusion that it would be better that he not — that he not testify." It was Casanova's experience that his client, an indigent 22-year old facing murder charges, deferred to his expertise and judgment.

2. *Johnson Denies The Murder Crimes*

Unprepared by his counsel to testify at his murder trial and thus not presented by counsel to deny the charges, Johnson did testify at his post-conviction trial.[6] Without challenge from the State, Johnson described to the post-conviction judge pro tempore that he had desired to testify in his murder trial. But his lawyer had recommended that he not testify, and Johnson deferred to his counsel's judgment.

At the post-conviction trial, Johnson denied shooting Ron and Davenport. When asked who did, he stated, "Demonn Carter." The jury in the murder case, however, never had the opportunity to observe Johnson deny the crimes under oath and accuse Demonn.

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6. Unfortunately the trial judge who had presided over the murder trial and who signed the post-conviction denial order, did not preside over the post-conviction trial (a pro tem judge did) so she did not see and hear him testify.

3. *Unchallenged Expert Opinion*

Johnson presented unrefuted expert testimony at the post-conviction trial from Bob Hill ("Hill"), an experienced criminal defense attorney. He was admitted in 1982, has been a public defender since 1985, and has tried over 200 jury trials. He has served as a deputy public defender, chief public defender, a public defender trainer, and is on the Board of Directors of the Indiana Public Defenders Council.

Hill outlined various objective standards and principles of criminal defense practice, all without impeachment. For instance, investigation and preparation are "extremely important" in a murder case. It is important in a murder case to study, deliberate, analyze, and select trial themes. It is then important to amass all possible evidence to support the themes selected.

Hill outlined the written objective guidelines established for criminal defense by the Indiana Public Defenders Council. These objective guidelines were developed based on standards from the American Bar Association, the National Legal Aid and Defender's Association, and case law. The objective standards embraced in the published guidelines applied as well in 1997-98 when Johnson's case was tried.

Among the many guidelines in the Public Defender Council's publication that were discussed by Hill is Guideline 7.5(b), which states that counsel should discuss with his client all of the considerations relevant to the client's decision to testify. Hill confirmed, without challenge, that it is objectively unreasonable for a defense lawyer not to have the defendant testify despite his desire to do so because of concerns that the defender had not adequately prepared him. The decision

whether to have the accused testify should only be made after a thorough investigation and preparation.

Hill, knowledgeable about the Marion County Public Defender's office, confirmed that the office's case load was too high at the time of Johnson's murder trial. Finally, regarding defense counsel's failure to keep 404(b) other crimes evidence from the jury, Hill confirmed — again without objection or impeachment — that this failure was objectively unreasonable. Such 404(b) evidence can be excluded by a motion in limine, and Hill confirmed that limine motions and redactions of 404(b) evidence are routine. Excluding such evidence is important because a jury might think the defendant is a "bad guy."

Unchallenged and unrefuted on any of these points, Hill concluded as follows:

> Q. In your judgment in this case, from what you know about it, did the ... Public Defender's Office, did its defense fall below reasonable standards of defense in the following: in failing to investigate [Wishard] witnesses and records?
> A. Yes.
>
> Q. In failing to depose Demonn Carter?
> A. Yes.
>
> Q. In failing to consider bringing Demonn to trial ...
> A. To display him to the jury ...

Q. Yes.
A. Yes.

* * *

Q. In failing to prepare Michael Johnson to testify so as to be able to make an informed decision about whether to have him testify?
A. Yes.

Q. In failing to object to evidence of Michael Johnson being on parole?
A. Yes.

Q. [B]ut for these failures, either alone or in combination — is it your professional opinion that there's a reasonable probability that the result would have been different in Michael Johnson's case?
A. Yes.

Hill concluded that the public defender did not render effective defense to Johnson. Hill's final, unchallenged opinion was as follows, "The Public Defender's Office did not do justice to your client. And sadly so."

4. *Unrefuted Evidence Establishing A Reasonable Probability That Effective Assistance Of Counsel Would Have Made A Difference*

Substantial and unrefuted evidence was presented at the post-conviction trial establishing a reasonable probability that effective assistance of counsel would have made a difference, and much of that evidence is previously outlined above. In addition, without objection or impeachment, Hill confirmed that "it is reasonably probable that [Johnson] would have made a good impression on the jury, [and had he] testif[ied], would have impacted the outcome of the case." Casanova thought Johnson would make a good witness, and had desired to have him testify (but then failed to prepare him).

Finally, Hill testified — again without objection or impeachment — that defense counsel's errors and omissions, alone and in combination, were prejudicial, and that but for those failures, a reasonable probability exists that the result would have been different:

> Q. [B]ut for these failures, either alone or in combination — is it your professional opinion that there's a reasonable probability that the result would have been different in Michael Johnson's case?
>
> A. Yes.

REASONS FOR GRANTING THE PETITION

I. Summary Of Grounds

The Indiana proceedings resulted in a decision that is contrary to this Court's relevant holdings, and that decides an important question of federal law that should be settled by this Court. First, to sustain his Sixth Amendment claim of ineffective assistance of counsel, Indiana required Johnson to show that had he testified, the result *would have been different*. This is contrary to this Court's well-settled *reasonable probability* standard. Second, the Indiana proceedings essentially decided that it is constitutionally permissible for defense counsel not to prepare defendants to testify. Several other states and one U.S. Circuit Court of Appeals have indicated otherwise. This Court should specifically address this Sixth Amendment issue to settle this important question.

As a result of these constitutional errors, Johnson was denied effective assistance of counsel as guaranteed by *Strickland v. Washington*, 466 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003), on the standards of the "effective assistance" required by the Sixth Amendment. He was also denied his right to testify. *Rock v. Arkansas*, 483 U.S. 44, 46 (1987) (in confirming the constitutional right to testify to be a fundamental right, the Court writes, "In fact, the most important witness for the defense in many criminal cases *is the defendant himself*") (emphasis added); *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system").

II. Indiana Imposed A Higher Sixth Amendment Standard Upon Petitioner To Show That Effective Assistance Of Counsel "Would Have Changed" The Result, Conflicting With Relevant Decisions Of This Court

The Indiana courts erred as a matter of law by not properly applying this Court's legal standards to the undisputed evidence. For instance, the trial court wrote in its legal conclusions, "None of the evidence produced during his post-conviction investigation constitutes evidence that *would have changed* the result of Petitioner's trial." [App. 28a] (emphasis added). On the core issue of Johnson's right to testify at trial, the trial court similarly held, ". . . such testimony *would not have affected* the jury's verdict. . . ." [App. 30a] (emphasis added).

This is the incorrect legal standard, however, for Johnson's burden to protect his Sixth Amendment rights was only to show a *reasonable probability* that the outcome would have been different, *not* that the evidence "*would have changed*" the result. *Strickland v. Washington*, 466 U.S. at 694 ("defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). The former, accurate legal standard merely requires that Johnson undermine confidence in the outcome. *Id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome"); *Wiggins v. Smith*, 539 U.S. at 534 (same). The latter standard applied by the Indiana courts would improperly require a guarantee of a different result, contrary to this Court's well-settled Sixth Amendment precedent.

This constitutional error was not corrected on appeal to the Indiana Court of Appeals nor by the divided Indiana Supreme Court. The Court of Appeals simply declined to reach the issue, while a slim majority of the Indiana Supreme Court actually declared — without citation of authority — that the post-conviction trial court applied "the proper legal standard in deciding the case." [App. 47a]. This Court should grant the writ of certiorari to correct this constitutional error.

III. Indiana Erroneously Decided An Important Question Of Federal Law That This Court Should Settle: The Sixth Amendment's Guarantee Of Effective Assistance Of Counsel Requires Defense Counsel To Prepare Clients To Exercise Their Constitutional Right To Testify

The Indiana courts essentially ruled there is no prejudice to a defendant's Sixth Amendment rights when counsel fails to prepare the accused to testify and the accused does not testify as a result. At least one state suggests otherwise. In *Magbual v. State*, 20 P.3d 676, 2000 Haw. App. LEXIS 147, *26 (Haw. Ct. App. 2000), the court wrote that "if defense counsel fails to perform sufficient preparation and investigation to be able to adequately advise a defendant whether or not to testify, e.g., by failing to ascertain the full scope of a defendant's possible testimony, this could constitute a 'lack of diligence' amounting to ineffective assistance of counsel." *See also State v. Graham*, 906 S.W.2d 771, 786 (Mo. Ct. App. 1995) ("The defendant made the decision [to testify], but the defendant was entitled to reasonably competent advice in making the decision"), *vacated, in part, on other grounds* at 969 S.W.2d 759 (Mo. Ct. App. 1998).

Moreover, at least three other jurisdictions recognize that defendants have the right to be prepared to testify on their own behalf. In *Perrero v. State*, 990 S.W.2d 896, 899 (Tex. Ct. App. 1999), for instance, defense counsel was held to be ineffective for failing to adequately prepare the defendant before he testified. The court explained:

> Mr. Perrero described the entire process of deciding whether or not he would testify as being a split second decision. "After the state presented all their witnesses Mr. Hill [trial counsel] turned to me and asked me if I would care to get on the stand. And I told him I didn't know, and he said, 'Well, do you feel like doing it?' And I said, "I guess so'."

Id. at 899. In granting relief and ordering a new trial, the Texas Court of Appeals concluded, "In this case, trial counsel's failure to properly prepare Mr. Perrero for his testimony was both ineffective and extremely prejudicial, to the extent that it undermines our confidence in the outcome of the proceeding." *Id. See also People v. Smith*, 237 A.D. 2d 388, 655 N.Y.S.2d 416 (N.Y. S. Ct. 1997) (failure to prepare defendant to testify contributed to ineffective assistance of counsel).

Similarly, in *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), the court wrote:

> Smyth's failure to adequately consult with and prepare his client to testify did not meet the standard of competent representation. . . . Counsel's admission that he spent at most forty-five minutes with Turner prior to trial demonstrates deficient

> performance. . . . Smyth's cursory consultation is especially shocking in light of the seriousness of the charges against Turner, the fact that the entire defense hinged on Turner's intent and mental state, and that Turner testified in a manner that suggests he was wholly unprepared to answer questions on cross-examination.

Id. at 457.

Although it is "well established that the defendant has the right to testify on his own behalf . . . ," *Riggins v. Nevada*, 504 U.S. at 144 (Kennedy, J., concurring), this Court has not addressed the present situation when defense counsel fails to prepare the accused to testify, resulting in the accused not exercising his constitutional right.

A criminal defendant does, in fact, have a constitutional right to testify on his own behalf. *In re Oliver*, 333 U.S. 257, 273 (1948); *Rock v. Arkansas*, 483 U.S. at 49-53; *Riggins*, 504 U.S. at 144. This right is "an aspect of [the criminal defendant's] right to defend himself," *Underwood v. Clark*, 939 F.2d 473, 475 (7th Cir. 1991), which arises from the Sixth Amendment's guarantee of compulsory process to obtain favorable witnesses, *see Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 808 (1994) as well as the Fifth Amendment's due process clause. It is also a "necessary corollary" of the Fifth Amendment's guarantee against compelled testimonial self-incrimination. *United States v. Manjarrez*, 258 F.3d 618, 623-24 (7th Cir. 2001). Only the defendant may waive this right, not counsel, and it must be knowing and voluntary. *Id.*

Moreover, this Court recently explained that an attorney has an obligation to consult with an accused regarding his right to testify. In *Florida v. Nixon*, 2004 U.S. LEXIS 8270, 125 S. Ct. 551, 560, (Dec. 13, 2004), the Court wrote:

> An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy. *Strickland*, 466 U.S. at 688. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.' *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

125 S. Ct. at 560 (parallel citations omitted).

Despite this precedent, Indiana has effectively excused defense counsel from the obligation to prepare the accused to testify. Without such preparation, however, no meaningful consent can be given by the accused to counsel's recommended course of action. In cases such as this — when

the evidence is hotly contested and the defendant desires to testify — failure to prepare the accused to testify simply cannot be deemed effective assistance of counsel. This Court should grant the writ of certiorari so that this important constitutional issue can be settled.

CONCLUSION

Indigent defendants must depend on public defenders to protect their constitutional rights. When public defenders fail to do so, the courts are the constitutional safety net. The Indiana courts, however, failed to follow this Court's precedent on the appropriate constitutional standard, and effectively determined that defense counsel need not prepare clients to testify. The petition for a writ of certiorari should be granted accordingly so that this Court can address and settle these important constitutional issues.

Respectfully submitted,

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